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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL LANCE BALLARD, JR.,

Defendant and Appellant.

E050584

(Super.Ct.No. RIF147039)

OPINION

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge.

Affirmed as modified.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General and Kevin Vienna, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Daniel Lance Ballard, Jr., appeals after he was convicted of robbery, attempted robbery, and street gang terrorism. He contends that the trial court

erred in imposing sentence on the street gang offense; he argues that the term for that offense should have been stayed under Penal Code section 654.<sup>1</sup> Following this court's precedent in *People v. Sanchez* (2009) 179 Cal.App.4th 1297 (Fourth Dist., Div. Two), we agree with defendant that the term on count 3 should have been stayed. We therefore order the sentence modified, and we affirm the judgment as modified.

### FACTS AND PROCEDURAL HISTORY

On November 12, 2008, Juan Ortiz, an employee of a liquor store in Perris, was taking a break outside the store, sitting on the curb. Defendant approached and demanded that Ortiz give him a dollar. Ortiz refused; defendant responded by jerking Ortiz to his feet, shoving him around the corner and pushing him up against the wall. Defendant aggressively searched Ortiz's pockets, looking for money. Ortiz tried to push defendant away. Defendant punched and kicked Ortiz.

Francisco Garza, another employee, saw defendant with his hands in Ortiz's pockets. He ran over to help Ortiz. Garza told defendant to leave Ortiz alone, and then started to walk away, telling defendant that he would call the police. Defendant grabbed Garza by the slack of his jacket and threw him to the ground. Ortiz saw defendant punching Garza (Garza testified that defendant did not hit him in the face, but that Garza struck his face on the ground when defendant threw him down). Ortiz escaped, ran into the store, and used the store owner's mobile telephone to call the police. Ortiz and Garza

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

saw defendant jump into the passenger seat of a silver car, which then left the area.

Garza later realized that his mobile telephone was missing from the holster on his belt.

A block or so away from the liquor store, sheriff's deputies found defendant in an apartment complex. Ortiz identified defendant as his assailant. He also identified another man as the driver of the silver car. Garza's mobile telephone was recovered from defendant's pocket.

A gang expert testified at trial. The liquor store where the attacks occurred was in the territory of a local gang, the P-Loc Crips. Defendant claimed membership in the P-Loc Crips when he was apprehended. Defendant had claimed the same affiliation in past police contacts; defendant's gang moniker was "Gangster." The gang expert opined that both defendant and the driver of the silver car, as well as other men found in the apartment with them, were gang members.

A jury found defendant guilty of the robbery of Garza (§ 211), the attempted robbery of Ortiz (§§ 211, 664), and street gang terrorism (§ 186.22, subd. (a)). The trial court found true allegations that defendant had served a prior prison term (§ 667.5, subd. (b)) and that defendant had a prior strike conviction (§§ 667, subds. (c), (e), 1170.12, subd. (c)(1)). The court sentenced defendant to nine years eight months in state prison, consisting of six years on count 1 (robbery, midterm of three years doubled to six years), 16 months consecutive on count 2 (attempted robbery, one-third the middle term of two years, doubled as a second strike), and 16 months consecutive on count 3 (gang terrorism, one-third the middle term of two years, doubled as a second strike).

Defendant now appeals, urging that the trial court erred in imposing sentence on count 3; he contends that the sentence on that offense should have been stayed under section 654.

## ANALYSIS

### I. The Sentence on the Gang Terrorism Count Should Be Stayed

In *People v. Sanchez*, *supra*, 179 Cal.App.4th 1297, this court held that, where an underlying felony was the basis for finding true the crime of gang participation, the defendant's intent and objective in committing both the felony and the gang terrorism offense are the same. Accordingly, section 654 applies, and sentence on the gang terrorism offense should be stayed. The instant case is indistinguishable from *Sanchez*. The underlying robbery and attempted robbery were necessary elements of count 3, the gang terrorism offense. Defendant's intent in committing the gang offense was identical to the intent in committing the underlying felonies. The same act that made the robbery and attempted robbery punishable also made the gang terrorism offense punishable. Just as in cases of felony murder and the underlying felony, the underlying felonies here were necessary elements that transformed defendant's gang membership into a criminal offense. (*People v. Sanchez*, at p. 1315.) In the absence of any evidence of an independent intent and purpose, section 654 applies to prohibit punishment for both charges.

We note that other courts have decided the issue differently (See *People v. Mesa* (2010) 186 Cal.4th 773, review granted Oct. 27, 2010, S185688 [Fourth Dist., Div. One]), but follow our own precedent on the question.

DISPOSITION

The judgment is modified, as follows: The 16-month term imposed on count 3 (gang terrorism) is hereby stayed. This stay shall become final if and when defendant has served the remainder of his sentence. The judgment as thus modified is affirmed. The trial court is directed to prepare an amended abstract of judgment, and to forward certified copies of the amended abstract to the Department of Corrections and Rehabilitation. (§§ 1213, 1216.)

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/s/ McKINSTER

J.

We concur:

/s/ HOLLENHORST

Acting P. J.

/s/ KING

J.